ployees of a department of health of any city of over one million population who resides (a) in the county in which such city is located; or (b) in a county within the state contiguous to the county in which said city is located; or (c) in a county within the state contiguous to such city; or (d) in a county within the state which is not more than fifteen miles from said city."

N.Y. Pub. Officers Law:

"§ 30. Creation of vacancies

1. Every office shall be vacant upon the happening of one of the following events before the expiration of the term thereof:

• • •

d. His ceasing to be an inhabitant of the state, or if he be a local officer, of the political subdivision, or municipal corporation of which he is required to be a resident when chosen;

• • •

4. Neither the provisions of this section, nor of any general, special or local law . . . rule or regulation, creating a vacancy in a local office of a . . . municipal corporation if the incumbent thereof ceases to be a resident of such . . . municipal corporation, shall apply in the case of a person who is a member of the police force of any . . . municipal corporation of the state and who while a member of such force resides (a) in the county in which such . . . municipal corporation is located; or (b) in a county within the state contiguous to the county in which such . . . municipal corporation is located; or (c) in a county within the state contiguous to such . . . municipal corporation; or (d) in a county within the state contiguous to a county described in item (c) hereof where the former is less than fifteen miles from such . . . municipal cor-

poration, measured from their respective nearest boundary lines; or (e) in a county within the state contiguous to a county described in item (d) hereof where the former is less than thirty miles from such . . . municipal corporation, measured from their respective nearest boundary lines:

• • •

5. Neither the provisions of this section, nor of any general, special or local law, charter, code, ordinance, resolution, rule or regulation, creating a vacancy in a local office of a . . . municipal corporation if the incumbent thereof ceases to be a resident of such . . . municipal corporation, shall apply in the case of a paid member of the uniformed force of a paid fire department, or in the case of a person employed in a department of correction in the correction service of the classified civil service, or in the case of officers and inspectors employed in a department of health of a city of over one million population who resides (a) in the county in which said city is located; or (b) in a county within the state contiguous to the county in which such city is located; or (c) in a county within the state contiguous to such city; or (d) in a county within the state which is not more than fifteen miles from said city; or (e) in a county within the state contiguous to a county described in item (d) hereof where the former is less than thirty miles from such political subdivision or municipal corporation, measured from their respective boundary lines."

Statement of Facts

In 1971 petitioners conceived a plan to provide residents of certain Model Cities areas in New York City with preferential treatment in order for them to gain access to the Police and Fire Departments of the City of New

York (hereinafter "Uniformed Forces"). The plan was also designed to guarantee such residents advancement through the ranks of the Uniformed Forces (R. 48).*

The plan which petitioners designed and then submitted to the Secretary of the Department of Housing and Urban Development (hereinafter "HUD") for the purpose of obtaining funds pursuant to the Model Cities Act, 42 U.S.C. §§ 3301-13, called for a civil service examination to be administered only to residents of the Model Cities areas for positions in the Uniformed Forces (the Model Cities positions are hereinafter referred to as "M.C."). Upon being appointed to the initial position, Aid M.C., each appointee would then be eligible for advancement to the next civil service position, Patrolman M.C., or Fireman M.C., (hereinafter collectively referred to as "Uniformed Forces M.C."). In order to be eligible to take either an Aid M.C. examination or a Uniformed Forces M.C. Examination, as well as to retain each appointed position after passing each examination, one had to be a resident of a Model Cities area. The incumbents of the Uniformed Forces M.C. titles would be eligible to compete with all other Firemen, Patrolmen, and Housing Patrolmen, respectively for promotion within their departments (R. 48).

Respondents herein include both the line organizations and the superior officers organizations of the New York City Fire Department, Police Department, and Housing Authority Patrolmen. Respondents also include various individuals in their capacities as the Presidents of each of the organizations and as citizens of the State of New York.

The proposed New York City plan limiting eligibility to positions within the Uniformed Forces to Model Cities residents has not been utilized elsewhere, although over

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* R refers to the Record on Appeal before the New York courts.

150 cities and counties in 45 states, the District of Columbia and Puerto Rico have received Model Cities grants (R48, Exhibit 1, p. 15). As characterized by petitioners, the proposed plan was "unprecedented" (R158, Exhibit 3, p. 1). It must be emphasized that there were numerous alternatives available to petitioners by which they could have increased the number of Model Cities residents employed by the Uniform Forces without running afoul of New York law. Respondents, themselves, proposed a program under which Model Cities residents could receive special educational assistance to enable them to pass competitive examinations (R32). Other cities in New York State (R85), and New York City itself (R156), have managed to develop Model Cities programs which conform to both Federal and State Law.

New York's highest court, the Court of Appeals, ruled in favor of respondents herein, finding that the New York State Constitution and various New York statutes prohibit local residency requirements for members of New York City's Fire Department, Police Department and Housing Authority. Since the federal legislation providing for Model Cities programs requires conformity with local law there is no violation of the federal Supremacy Clause.

Argument

All parties agree, as a matter of basic constitutional law, that Congress by operation of the Supremacy Clause can override and supersede state law. In the instant case the New York Court of Appeals found that Special Term was correct in its determination that the residency requirements imposed by respondents in their plan to provide jobs in New York City's Uniformed Forces for residents of Model Cities areas violated the Constitution and laws of the State of New York. Accordingly, since New York's highest court has authoritatively construed that state's

Constitution and relevant statutes, and since petitioners rely upon such construction to support their Supremacy Clause claim, the sole issue herein is whether by enactment of the Model Cities legislation Congress intended to override state law in respect to examinational residency requirements.

I.

This is not a case under the Supremacy Clause in which federal action supersedes state action,—whether or not conflicting,—by reason of pre-emption of an area by the Congress since the Model Cities Act, 42 U.S.C. § 3303(a)(4), mandates federal deference to, not supersession of, state law.

Petitioners purport to find in the Model Cities legislation the necessary congressional mandate and authorization to permit an examination which excludes non-Model Cities residents, even if such exclusion is contrary to state law. The paradox of petitioners' argument is that it derives its momentum from the very federal statute and administrative interpretations which expressly disallow the intent attributed by petitioners.

Congress in the Model Cities Act specifically provided:

> "A comprehensive City demonstration program is eligible for assistance under sections 3305 and 3307 *only if*—. . . .
>
> (4) . . . . substantive local laws, regulations and other requirements are or can be expected to be consistent with the objectives of the program . . . ." 42 U.S.C. § 3303 (a) (4) [Emphasis added].

The Joint Conference Committee Report which provides the basic legislative history of the Model Cities Act is equally

explicit that all Model Cities programs are necessarily subject to local and state law.

> "[T]he criteria require that . . . (5) local laws, regulations, and other requirements are, or can be expected to be consistent with the objectives of the program." 3 U.S. Code Cong. and Admin. News 4009-10 (1966).

The intent of Congress with respect to such legislation is supported by administrative interpretation. HUD in its directive to applicants for financial assistance advises that:

> "If local or State laws and regulations present obstacles to achieving program goals appropriate modifications should be sought." R. 80, Exhibit E, p. 24.

Furthermore, the Assistant Secretary of Housing and Urban Development has stated that:

> "[W]e [HUD] have consistently required the Cities to adopt their own appropriate strategies to assure the employment of Model Neighborhood Residents in all phases of the program. The specific mechanics which cities might adopt are left to local initiatives *subject to applicable statutes.*" [Emphasis added] R. 122, Exhibit A.

The conclusion is inescapable. The very words of the Model Cities Act, the Joint Conference Committee Report, and HUD's administrative interpretations all prove that Congress did not intend to override state legislation. An applicant for federal assistance under the Model Cities Act must do one of two things; it must either design a plan which is consistent with state and local law or, if it designs a plan which is inconsistent with state or local law, it must seek to amend or repeal any inconsistent statutes.

An instance of the latter occurred in June of 1971 when, with the Model Cities Act specifically in mind, the New York

State Legislature amended § 23(4) of the New York State Civil Service Law by adding thereto subdivision b (L. 1971, c.785), which provides as follows:

> "Geographic certification based on need. A municipal commission having jurisdiction over a city or civil division may provide that eligibles, other than those eligibles on policemen and firemen lists, who are residents of a geographically-defined area which is a portion of such city or civil division shall be certified first for appointment to positions in such area where in order to qualify for federal monies such certification is required. Upon exhaustion of the list of such resident eligibles, certification shall be made from the whole eligible list."

Although section 23, by its terms, is not applicable to fire or police eligibles or to New York City, such amendment is a striking example of how Congress intended states to remove obstacles in order to take advantage of available Model Cities Act funds.

It is, therefore, clear that the Model Cities legislation here under review is not of a preemptive nature so as to preclude state action in the area involved.

II.

New York State's highest court has authoritatively construed the New York State Constitution, Article 5, § 6, and the applicable New York Statutes, Gen. Munic. Law § 99-h (2) and (4), and Pub. Officers Law §§ 3 and 30, to prohibit the imposition of local residency requirements for positions in New York City's Uniformed Forces.

"Deciding whether a state statute is in conflict with a federal statute and hence invalid under the Supremacy Clause is essentially a two-step process of first ascertaining the construction of the two statutes and then determining the constitutional question of whether they are in conflict." *Perez* v. *Campbell*, 402 U.S. 637, 644 (1971). We have already established above that the Model Cities Act itself requires that cities applying for funding under the Act present programs in conformity with state and local law. New York's highest court, the Court of Appeals, in the instant case authoritatively construed New York's Constitution and statutes to prohibit the imposition of residency requirements for positions in New York City's Uniformed Forces.

The legislation which authorized petitioners to ". . . apply for, accept and expend funds made available by the federal government . . . ." is contained in § 99-h (2) of the New York State General Municipal Law. However, such section expressly limits any application for funds from the federal government to a program ". . . which is not inconsistent with the statutes or constitution of this state. . . ." Furthermore, subdivision 4 of the statute emphasizes that ". . . it is not intended by this section to repeal by implication any existing provision of law." Thus, it is established that any proposed program may not contravene the laws of the State of New York.

The strong public policy of New York in favor of merit competitive examinations for filling civil service positions is embodied in its very Constitution. Article 5, § 6, of the New York State Constitution provides:

> "Appointments and promotions in the civil service of the state and all of the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive. . . ."

Special Term, in its opinion which was adopted by the New York Court of Appeals, found that the restrictive residency requirements of the proposed Model Cities program violated this basic provision of the New York State Constitution.

Furthermore, the New York State legislature has emphasized the importance of merit competition for members of the Police and Fire Departments, such departments being especially essential to the health, welfare, and safety of the people of the state. New York State Public Officers Law, Section 3 (2) provides:

> "*Neither* the provisions of this section or of any general, special or local law, charter, code, ordinance, resolution, *rule or regulation*, requiring a person to be a resident of the political subdivision or municipal corporation of the state for which he shall be chosen or within which his official functions are required to be exercised, *shall apply to the appointment of a person as a member of the police force of any political subdivision or municipay corporation of the state* if such person resides (a) in the county in which such political subdivision or municipal corporation is located; or (b) in a county within the state contiguous to the county in which such political subdivi-

> sion or municipal corporation is located; or (c) in a county within the state contiguous to such political subdivision or municipal corporation; or (d) in a county within the state contiguous to a county described in item (c) hereof where the former is less than fifteen miles from such political subdivision or municipal corporation . . . ." [Emphasis added].

Substantially identical provisions apply to the fire department under subdivision 9.

Any doubt as to the applicability and the controlling effect of the New York State Public Officers Law may be readily dispelled by a consideration of the corollary provisions contained in the New York State Public Officers Law, Section 30. Subdivision 4 of Section 30 prohibited the petitioners herein from requiring incumbent members of the police force to reside within New York City. This section provides as follows:

> "Neither the provisions of this section, nor of any general, special or local law, . . . *rule or regulation*, creating a vacancy in a local office of a . . . municipal corporation if the incumbent thereof ceases to be a resident of such . . . municipal corporation, *shall apply in the case of a person who is a member of the police force of any political subdivision or municipal corporation of the state* . . . . [Emphasis added].

Similar provisions apply to members of the Fire Department under subdivision 5.

Petitioners [illegible] the objectives of Congress and in a manner which they attempted to implement was built in its violation of the laws and Constitution of the State of New York. In a belated attempt to correct their error, petitioners now seek to invoke the protection of the Supremacy Clause by citing numerous cases which either fail to support their contention or are inapposite.

Congress can, by operation of the Supremacy Clause, override and supersede state law. But, in the words of this Court, "[s]tatements concerning the 'exclusive jurisdiction' of Congress beg the only controversial question: whether Congress intended to make its jurisdiction exclusive." *California* v. *Zook*, 336 U.S. 725, 731 (1949). In the Model Cities Act, Congress did not intend to make its jurisdiction exclusive. It specifically provided that federal assistance would be available for a program only if ". . . substantive local laws . . . are . . . consistent with the objectives of the program. . . ." 42 U.S.C. § 3303 (a) (4). It thus specifically disclaimed pre-emption of the field, leaving to the states and localities freedom to develop programs which conform both to the objectives of the Model Cities Act and to the precepts of state and local law.

Cities in New York State (R85), including New York City (R156), as well as cities in other states (R48, Exhibit I, p. 15), have managed to develop Model Cities programs which conform to both federal and state law. Despite New York's ban on residency requirement for members of the Uniformed Forces, there were innumerable methods that New York City could have used to increase the participation of Model Cities residents in its Uniformed Forces. Respondents themselves suggested that such residents receive special educational assistance to enable them to pass competitive examinations (R32). It is clear, therefore, that petitioners could have designed a program to meet the objectives of the Model Cities Act and yet be consistent with the State's laws.

Even if Congress had not made clear in the Model Cities Act itself that state laws were not to be pre-empted, the decisions of this Court hold that the test of whether the Supremacy Clause is to be invoked to strike down a state law is a rigorous one. A Congressional mandate to override state legislation must be "unambiguous," *Florida Lime and Avacado Growers, Inc.* v. *Paul*, 373 U.S. 132, 147 (1963), and "clearly manifest," *California* v. *Zook*, 336 U.S. 725, 733 (1949). This is especially true regarding legislation in areas of traditional state concern, statutes affecting the health and safety of state residents. *Penn Dairies, Inc.* v. *Milk Control Comm'n of Pennsylvania*, 318 U.S. 261, 275 (1943); *Maurer* v. *Hamilton*, 309 U.S. 598, 614 (1940); *Kelly* v. *Washington*, 302 U.S. 1, 13 (1937). There can be no question that the selection of members of Police and Fire Departments on the basis of merit examinations is most clearly a matter of utmost concern to the safety and welfare of the people of the State of New York. In light of § 3303 (a) (4), Congress in the Model Cities Act did not "clearly manifest" an intent to override state statutes such as those involved in the instant case.

This Court has recently reaffirmed that even in ". . . areas of coincident federal and state regulations the 'teaching of this Court's decisions . . . enjoin[s] seeking out conflicts between state and federal regulations where none clearly exists.'" *Seagram and Sons, Inc.* v. *Hostetter,* 384 U.S. 35, 45 (1966). Clear standards have been defined and applied in cases involving concurrent state and federal regulations. In *Florida Lime and Avacado Growers, Inc.* v. *Paul,* 373 U.S. 132 (1963), this Court dealt with two statutes, the federal Agricultural Marketing Agreement Act of 1937 and the California Agricultural Code, both of which sought to insure the maturity of avacados reaching retail markets. Noting that the statutes embodied different maturity tests, this Court stated:

> "However, this difference poses rather than disposes of the problem before us. Whether a state may constitutionally reject commodities which a federal authority has certified to be marketable depends upon whether the state regulation 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' *Hines* v. *Davidowitz,* 312 U.S. 52, 67. By that test we hold that § 792 is not such an obstacle; there is neither such an actual conflict between the two schemes of regulation that both cannot stand in the same area, nor evidence of a congressional design to preempt the field." *Id.* at 141

Since there was "no inevitable collision" between the two schemes in *Florida Lime,* the state law was allowed to stand.

There is no "inevitable collision" between the Model Cities Act and New York State's prohibition of residency requirements for members of New York City's Uniformed Forces. Prior experience with Model Cities programs confirms that one could be readily fashioned here to meet the purposes intended (See R 126-27). In such circumstances the "inevitable collision" required as a condition for the invalidation of otherwise valid state legislation is absent.

Conclusion

The Model Cities Act requires that programs be in conformity with state and local laws. Thus, Congress itself disclaimed any intent to preempt the field and thereby invalidate preexisting state and local laws. Even when there have been state and federal enactments in the same field, this Court has sought to reconcile the legislation and has struck down state statutes only when Congressional intent to preempt has been "unambiguous" and "clearly manifest." The goal of providing excellent Uniformed Forces to Model Cities areas and of recruiting Model Cities residents into such Uniformed Forces do not necessarily conflict with New York State's Constitutional and legislative prohibitions against local residency requirement for members of the Uniformed Forces. This Court need not even reach the constitutional issue which is unavoidable where state law conflicts inevitably with federal law which Congress intends to prevail, since the Congress itself in the Model Cities Act specifically provided that federally funded programs must conform to state and local laws.

The petition for a writ of certiorari should be denied.

Dated: New York, New York, October 31, 1973.

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Decision and Order of Court of Appeals
[33 N. Y. 2d 552]

Order reversed, without costs, on the opinion at Special Term and the judgment of Supreme Court, New York County, reinstated.

Concur: Judges BURKE, BREITEL, JASEN, GABRIELLI and JONES. Chief Judge FULD and Judge WACHTLER dissent and vote to affirm on the opinion at the Appellate Division.

Opinion of Appellate Division
[41 A. D. 2d 127]

STEVENS, P. J. The various petitioners, suing individually and as presidents of their respective organizations, commenced this article 78 proceeding to enjoin respondents from proceeding with a scheduled examination for positions as Aides Model Cities (M.C.) in the Fire and Police Departments and the Housing Authority, to enjoin the establishment of such positions, and to declare unlawful and unreasonable any actions of respondents to that end.

Petitioners-respondents (herein petitioners) obtained a stay at Special Term. This court, one Justice dissenting, modified to permit the examination to go forward but stayed the promulgation of any list or proposed acceptable answers. The dissenting Justice would have denied the stay entirely at that stage of the proceeding (*Matter of Maye* v. *Lindsay*, 37 A D 2d 803).

The proposed Aide (Model Cities) is a position with a starting salary of $5,750 per year and a maximum salary of $6,750. The duties in each category are fairly well defined. They do not include law enforcement or fire fighting authority. It is contemplated that at the end of six months the Aide will take or become eligible to take a promotion

examination for Patrolman (Model Cities) or Fireman (Model Cities), etc. They are not promoted to any regular title in any of the services, but solely to an M.C. title. In neither instance does the Aide become a regular member of the force, nor is his salary paid from city funds.

It is requisite that each applicant for the title of Aide (M.C.) be a resident "of a Model Cities area at the time of filing and must continue to reside in the same Model Cities area during the period of employment in a Model Cities title." Three Model Cities areas were designated by New York City. They are low-income areas, the population of which is either largely black or Puerto Rican or a combination of both. The program is designed to assist young men (ages 16 to 27) in the areas to become Aides in the three categories.

The Model Cities Program, which is funded by Federal funds and supplemental grants, which, incidentally, may or may not be available, seeks to upgrade the total environment of the slum or blighted neighborhoods selected, and to afford to its residents "maximum opportunities for jobs in the projects and activities of the program." The authority for, purpose of and scope of the program is found in chapter 41 of title 42 of the United States Code (U.S. Code, tit. 42, §§ 3301-3313).

The cities engaging in the program are required to plan, develop and carry out comprehensive city demonstration programs in accordance with the purposes of the statute. The Secretary of Housing and Urban Development (HUD) is authorized to make grants and provide technical assistance to enable them to do so. The demonstration program becomes eligible for assistance if "substantive local laws, regulations, and other requirements are, or can be expected to be, consistent with the objectives of the program" (U.S. Code, tit. 42, § 3303, subd. [a], par. [4]).

Petitioners attacked the residency requirement as violative of the statutes and Constitution of the State of New

York. The statutes upon which petitioners rely exempt policemen and firemen from residency requirements (Civil Service Law, § 23, subds. 4-a, 4-b; Public Officers Law, § 3, subds. 1, 2, 4 and 9; § 30, subd. 4). Petitioners further attack the program as violative of section 6 of article V of the New York State Constitution which requires appointments and promotions in the civil service to be by competitive examination. Special Term upheld petitioners and concluded that Congress has not excused compliance with what it concluded to be controlling provisions of State law. Special Term also invalidated the examination. Respondents appealed from the judgment entered.

The residency requirement applies only while the Aide is in an M.C. title. If successful in passing the initial examination and becoming an Aide (M.C.), the applicant can remain in that title a maximum of 15 months. In that period he must either successfully pass a second examination to policeman (M.C.), etc., or his employment is terminated. If successful, the applicant has taken two examinations and is not yet a policeman, fireman or Housing Authority patrolman. No program now exists for him to become such.

The fact is that the proposed Aides (M.C.) are not and may never become policemen, firemen or Housing Authority patrolmen. Essentially, in this respect, petitioners urge, and Special Term agreed, that the Aide (M.C.) is a preparatory step to becoming one of the foregoing. As noted earlier, when, as and if an Aide ever became a regular fireman or policeman the residency requirement now applicable to an Aide would not apply. Petitioners are complaining before they are hurt. Their present action is premature. Certainly they are not now aggrieved. Nor is it shown that someone outside of the areas in question who fits the stated requirements, exclusive of residence, was denied any right to which he was entitled. The argument here is premised on anticipatory harm.

Aides (M.C.) are just what the word implies. They are persons designed to assist in the performance of certain tasks. They are not to be armed or fight fires, and they are without the authority which the regular position carries. The provisions of the statute permitting and financing their creation are reasonably related to the express and desired goals. At this point they can hardly be considered competitive to the regular positions. They merely fill a need in a heretofore neglected area. Experimentation was and is warranted. Since the job categories created and the duties prescribed are completely different from any heretofore existing, the argument that they necessarily fall within the contemplation of the prohibitory statutes with respect to residency requirements, or the New York State Constitution with respect to competitive examinations, is of doubtful merit. We do not at this time pass upon any issue which might arise in the future when, conceivably, the lines of development merge.

In *Matter of Council of Supervisory Assns.* v. *Board of Educ. of City of N. Y.* (23 N Y 2d 458, 469), the court recognized and approved the "well-recognized power to create new positions for new needs" and to experiment in order to find solutions to urgent problems. Here, as in the cited case, there is no evasion of civil service requirements. The dire consequences envisaged by petitioners are not apparent. The judgment should be reversed, on the law, and the petition dismissed, without costs or disbursements.

Capozzoli, J. (dissenting). I most certainly approve of the objectives of the Model Cities Program and it is laudable indeed that it seeks to afford the residents of blighted neighborhoods "maximum opportunities for jobs in the projects and activities of the program". The particular program, which has led to the institution of this suit, will provide fine opportunities for young men in the age bracket 16 to 27 to prepare for their futures and it should be legally supported. The difficulty which is presented does not arise from the program, it arises out

of the obvious evasion by the City Civil Service Commission of the constitutional requirement of appointments on the basis of merit and fitness. To say to other young men in the same age bracket that they cannot participate in this excellent program, because they do not live in a particular neighborhood is a complete abandonment of the principle of merit and fitness, discriminatory and unfair. It does not contribute to harmonious relations amongst the residents of our city and, indeed, is likely to create discord, dissension and unrest at a time when everyone is striving for peace and understanding.

Because of this and for all the reasons expressed by the trial court in its excellent opinion, I dissent.

NUNEZ and KUPFERMAN, JJ., concur with STEVENS, P. J.; CAPOZZOLI, J., dissents in an opinion, in which LANE, J., concurs.

Judgment, Supreme Court, New York County, entered on April 18, 1972, reversed, on the law, and vacated, without costs and without disbursements, and the petition dismissed.

Opinion of Special Term

[69 Misc. 2d 276]

SAMUEL J. SILVERMAN, J. This is an article 78 proceeding to invalidate the actions of respondents in relation to the "Model Cities Program" to provide residents of Model Cities areas with preferential treatment in obtaining civil service appointments to the New York City Fire Department, Police Department, and Housing Authority Police, to enjoin respondents from establishing the titles of Aide (M. C.) Fireman (M. C.), Patrolman (M. C.), and Housing Patrolman (M. C.), and to restrain the administration of an examination for appointment to the title of Aide (M. C.). A basic objection to these examinations and titles is that they are open only to residents of Model Cities areas in the City of New York.

Petitioners sue both individually and as presidents of various organizations of policemen, firemen and Housing Authority patrolmen of the City of New York. Respondents are various city officials, including the Mayor, the Civil Service Commission, the Personnel Director of the city, the Police and Fire Commissioners, and the Chairman of the Housing Authority of the City of New York.

A preliminary injunction was granted by the Appellate Division permitting the disputed examination to go forward, but staying the promulgation of any resulting list or proposed acceptable answers, or any appointments based thereon, until the determination of this proceeding. (*Matter of Maye* v. *Lindsay*, 37 A D 2d 803 [1st Dept., Oct. 1, 1971].)

Chapter 41 of title 42 of the United States Code is entitled "Demonstration Cities and Metropolitan Development Program". Subchapter I (U. S. Code, tit. 42, §§ 3301-3313), headed "Comprehensive City Demonstration Programs", and the regulations promulgated thereunder, implement what is called the Model Cities Program.

Section 3301 contains the Congressional findings and declaration of purpose. The findings list the plethora of ills familiar to certain parts of our American cities; slums; concentration of poor people in certain areas; lack of housing and lack of services.

Under that statute, Federal moneys are made available to cities for Model Cities programs. The City of New York has applied for and presumably obtained funds to set up such a program.

As part of New York City's proposed program, the city designated three areas of the city as Model Cities areas—these being Central Brooklyn, Harlem—East Harlem, and South Bronx. Further, as part of the program, the City Civil Service Commission has created certain civil service titles, designated as "(Model Cities)" or "(M. C.)". Specifically, it has created the titles Police Aide (Model Cities), Patrolman (Model Cities), Police Trainee (Model Cities),

Fire Aide (Model Cities), Fireman (Model Cities), Fire Trainee (Model Cities), Housing Police Aide (Model Cities), Patrolman N. Y. C. Housing Authority Police Department (Model Cities), Police Trainee N. Y. C. Housing Authority Police Department (Model Cities).

The examination announced was for the establishment of a single list for the various Aide (M. C.) positions from which appointments would be made by either the Police Department, Fire Department, or Housing Authority. Appointments to Aide titles are to be for a period not to exceed 15 months; Aides not promoted within the 15 months will be terminated. After six months, Aides will be eligible to compete in a promotion examination for the respective positions of Patrolman (Model Cities), or, if under 21 years of age, Police Trainee (Model Cities); Fireman (Model Cities) or Fire Trainee (Model Cities); Patrolman New York City Housing Authority Police Department (Model Cities) or Police Trainee New York City Housing Authority Police Department (Model Cities). A Trainee, upon attaining the age of 21, will mature to the Patrolman, Fireman or Patrolman New York City Housing Authority Police Department (Model Cities) titles. From the positions of Patrolman (Model Cities), Fireman (Model Cities) or Patrolman New York City Housing Authority Police Department (Model Cities) candidates will be eligible to compete in promotion examinations for regular higher ranks in the Police Department, Fire Department and New York City Housing Authority police service, i.e., presumably sergeant or higher.

The duties of a Police Aide (Model Cities) are stated to be: "Under close supervision of the Police Department, working in a Model Cities area, assists and works mainly in programs designed to develop closer understanding and cooperation between the community and the Police Department; assists departmental personnel assigned to Model Cities areas in the attainment of Department objectives". The duties of the other Aides are similar.

The salaries of Aides will be $5,750 per year; the salaries of Patrolman (M. C.), Fireman (M. C.) and Patrolman New York City Housing Authority Police Department (M. C.) will apparently be the same as the salaries of the regular Patrolman, Fireman and Patrolman New York City Housing Authority Police Department, not (M. C.).

The commission has stated that the examination for Aide (M. C.) will be "less difficult than the regular entrance examination for Patrolman or Fireman", but that the promotion examination to the uniformed titles will be an "equivalent examination" which will be "equivalent to the regular open competitive examination for Patrolman, Fireman or Patrolman NYCHAPD. In addition the test will be designed to measure those special traits and understanding which enhance their capability to function effectively in the Model Cities areas".

The commission ordered an open competitive examination for the title of Aide (M. C.). It published the following residence requirement: "Applicants must be residents of a Model Cities area at the time of filing and must continue to reside in the Model Cities area during the period of employment in a Model Cities title".

Petitioners attack the validity of the proposed examination on the ground that the commission has no authority to establish this residence requirement; that the examination, and particularly the residence requirement, is a violation of the constitutional requirement of appointments on the basis of merit and fitness; that the plan involves racial discrimination (what has been called "reverse discrimination"). Respondents dispute each of these contentions, and further contend that the requirements are valid under the Supremacy Clause of the United States Constitution.

A. *Requirement of Compliance with State Statutes*

Respondents argue that they are excused from compliance with otherwise controlling State statutes because of the Supremacy Clause of the Federal Constitution, and

because of provisions of the applicable State statutes. I cannot accept either argument.

1. The Supremacy Clause of the United States Constitution (art. VI) provides in substance that the Constitution and the laws of the United States shall be the supreme law of the land. As it relates to Federal statutes this provision results in overriding State statutes only when the Congress intends to override State statutes. Here, the Congress explicitly stated that it did not intend to override State statutes. Thus, section 3303 (subd. [a], par. [4]) of title 42 of the United States Code specifically provides that a comprehensive city demonstration program (i.e., a Model Cities program) is eligible for assistance under the act only if "substantive local laws, regulations, and other requirements are, or can be expected to be, consistent with the objectives of the program."

This requirement has been recognized in a bulletin issued by the United States Department of Housing and Urban Development in December 1967, which provides (p. 24): "If local or State laws and regulations present obstacles to achieving program goals, appropriate modifications should be sought."

I conclude that the Congress did not intend to override State legislation.

2. The authorizing State legislation does not excuse compliance with other State laws. Section 99-h of the General Municipal Law which authorizes municipalities to participate in Federal programs, such as the Model Cities program, provides that any municipal corporation shall have power to accept funds made available by the Federal Government "pursuant to the provisions of any federal law, which is not inconsistent with the statutes or constitution of this state" (subd. 2). And subdivision 4 of that section provides that "it is not intended by this section to repeal by implication any existing provision of law."

Accordingly, the city's program to be valid must comply with applicable State statutes.

B. *Lack of Compliance with State Statutes*

3. Petitioners contend that the residence requirement is a violation of sections 3 and 30 of the Public Officers Law. Section 3 of the Public Officers Law is entitled "Qualifications for holding office" and in general provides that "No person shall be capable of holding a civil office who shall not, at the time he shall be chosen thereto • • • be • • • a resident of the state, and if it be a local office, a resident of the political subdivision or municipal corporation of the state for which he shall be chosen • • • or within which his official functions are required to be exercised". The statute then goes on to make a number of exceptions to this requirement, of which the most significant for our purposes are subdivisions 2, 4 and 9. They provide in part as follows:

"2. Neither the provisions of this section nor of any general, special or local law, charter, code, ordinance, resolution, rule or regulation, requiring a person to be a resident of the political subdivision or municipal corporation of the state for which he shall be chosen or within which his official functions are required to be exercised, shall apply to the appointment of a person as a member of the police force of any political subdivision or municipal corporation of the state if such person resides (a) in the county in which such political subdivision or municipal corporation is located; or "[various other counties within the city or state, essentially any county contiguous to the city or a county contiguous to a county within the city or less than 30 miles from the city]. • • •

"4. Except as otherwise provided in subdivision nine of this section, persons heretofore or hereafter employed in the paid fire department of a city, town, village or fire district shall not be deemed to be holding a civil office or a local office within the meaning of this section and the provisions of this section shall not apply to such persons. The provisions of any general, special or local law, city

or village charter, code or ordinance, or any rule or regulation requiring a person to be a resident of the political subdivision or municipal corporation of the state for which he shall be chosen or within which his official functions are required to be exercised shall not apply to the appointment or continuance in office of any such person so employed, if such person resides in the county, or one of the counties, in which such political subdivision or municipal corporation is located. * * *

"9. Neither the provisions of this section, nor of any general, special or local law, charter, code, ordinance, resolution, rule or regulation, requiring a person to be a resident of the political subdivision or municipal corporation of the state for which he shall be chosen or within which his official functions are required to be exercised, shall apply to the appointment of a paid member of the uniformed force of a paid fire department * * * of any city of over one million population who resides (a) in the county in which such city is located; or (b) in a county within the state contiguous to the county in which said city is located; or (c) in a county within the state contiguous to such city; or (d) in a county within the state which is not more than fifteen miles from said city."

Section 30 of the Public Officers Law entitled "Creation of vacancies" provides that: "Every office shall be vacant upon the happening of one of the following events * * * d. His ceasing to be an inhabitant of the state, or if he be a local officer, or the political subdivision, or municipal corporation of which he is required to be a resident when chosen". Again there are various exceptions of which the most important for our purposes are subdivisions 4 and 5 reading in part as follows: "4. Neither the provisions of this section, nor of any general, special or local law, charter, code, ordinance, resolution, rule or regulation, creating a vacancy in a local office of a political subdivision or municipal corporation if the incumbent thereof ceases to be

a resident of such political subdivision or municipal corporation, shall apply in the case of a person who is a member of the police force of any political subdiviison or municipal corporation of the state and who while a member of such force resides (a) in the county in which such political subdivision or municipal corporation is located; or" [various other counties somewhat analogous to the provisions of subdivision 2 of section 3]. * * *

"5. Neither the provisions of this section, nor of any general, special or local law, charter, code, ordinance, resolution, rule or regulation, creating a vacancy in a local office of a political subdivision or municipal corporation if the incumbent thereof ceases to be a resident of such political subdivision or municipal corporation, shall apply in the case of a paid member of the uniformed force of a paid fire department * * * who resides (a) in the county in which said city is located; or" [various other counties somewhat analogous to the provision of subdivision 2 of section 3].

Respondents argue that these statutes merely create an exception to the residence requirement of sections 3 and 30 of the Public Officers Law and do not forbid the imposition by the Civil Service Commission of residence requirements; that these exceptions are merely intended essentially to remove police and fire officer from the definition of public officers for this purpose. I cannot accept this argument. The fair meaning of these statutes is to permit police and fire officers to live in the specified areas outside the political subdivision in which they are to perform their functions. Subdivisions 2 and 9 of section 3 of the Public Officers Law and subdivisions 4 and 5 of section 30 create exemptions not only from the Public Officers Law requirement of residence applicable to public "officers" but also from "any general, special or local law, charter, code, ordinance, resolution, rule or regulation requiring a person to be a resident of the political subdivision or municipal corporation" etc. Indeed the first sentence of subdivision 4 of section 3

read with subdivision 9 seems to be an almost explicit rejection of the contention that the statute merely means that fire officers of the City of New York are not public officers.

Again, subdivision 4-b of section 23 of the Civil Service Law is a rather persuasive indication that the Legislature did not intend to allow civil service commissions to impose residence requirements for police and fire officers in the City of New York. Section 23 by its terms does not apply to the City of New York (subd. 5) but in authorizing other cities to require residence in a geographically defined area which is a portion of such city for positions in that area where required in order to qualify for Federal moneys, there is an express exception for "those eligibles on policemen and firemen lists".

I think the provisions of subdivisions 2 and 9 of section 3 of the Public Officers Law, and subdivisions 4 and 5 of section 30 of the Public Officers Law do not apply literally to the position of Aide (M. C.). Thus, subdivision 2 of section 3 and subdivision 4 of section 30 refer to "a member of the police force"; subdivision 9 of section 3 and subdivision 5 of section 30 refer to "a paid member of the uniformed force of a paid fire department".

An Aide (M. C.) is not, I think, either a member of the police force or a paid member of the uniformed force of a paid fire department. But the position of Aide (M. C.) is merely a preparatory position. The whole point of the creation of the position of Aide (M. C.) is eligibility for promotion to Patrolman (M. C.) or Fireman (M. C.) or Patrolman New York City Housing Authority, Police Department (M. C.), and indeed, further eligibility for promotion to the higher ranks of the uniformed police and fire departments. (I think a Patrolman in the New York City Housing Authority Police Department is "a member of the police force of any * * * municipal corporation of the state" within the meaning of sections 3 and 30 of the Public Officers Law. Cf. Public Housing Law, §§ 401, 402, subd.

5.) Unless the promotion takes place within 15 months, the position of Aide (M. C.) is terminated.

If, as I think, the requirements of residence within the Model Cities area invalidates provisions for promotion to the various Patrolman (M. C.) and Fireman (M. C.) positions, then the whole plan for Model Cities positions in the city civil service limited to residents within the Model Cities area fails.

I express no opinion as to the power of the heads of the various departments to assign to duties within the various Model Cities areas any regularly appointed patrolmen and firemen who may reside in those areas.

4. Quite apart from the special provisions of sections 3 and 30 of the Public Officers Law forbidding residence requirements for policemen and firemen more restrictive than those set forth in the statutes, I think the requirement of residence within the Model Cities area in the circumstances of this case violates the constitutional and statutory civil service requirements for appointments based on merit and fitness to be determined by competitive examinations, as far as practicable.

The basic civil service requirement is contained in section 6 of article V of the State Constitution, reading in part as follows: "Appointments and promotions in the civil service of the state and all of the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive;" (with exceptions not here relevant).

5. Respondents suggest that the residence requirement is somehow related to the desirability that the appointee shall have a special sensitivity to, understanding of, and experience with problems of the Model Cities areas. Petitioners contend that the residence requirement is merely a means of assuring that jobs shall go to a particular group—residents of the Model Cities areas.

I cannot accept the argument that the residence requirement can be justified on merit and fitness grounds because of the special sensitivity, understanding and experience required. I do not think it can rationally be contended that a person who has lived in the area all his life and moved to an adjoining area the day before the test, is less sensitive to, understanding of, or experienced with the problems of the area than a person who has never lived in the area, but moved in the day before the test; yet the latter is qualified to take the test and the former is not.

If, as respondents contend, these qualities of special sensitivity, understanding and experience can be objectively tested for, then they should be; and respondents say they will be. But to require residence within the Model Cities areas at the time of examination is not, I think, objectively related to those qualities. Rather, it is a means of affording employment to residents of the areas in preference—perhaps justifiable preference—to nonresidents of the areas. Indeed, that is one of the objectives of the Model Cities programs. The Corporation Counsel explicitly states that "The program here under attack was necessary in order to '[provide] maximum opportunities for employing residents of the areas in all phases of the program.'"

Respondents rely heavily on *Matter of Council of Supervisory Assns.* v. *Board of Educ. of City of N. Y.* (23 N Y 2d 458 [1969]). In that case the Court of Appeals held that the Board of Education of the City of New York could make temporary appointments to the position of principal of demonstration schools, not from the regular existing school principals' list, on the ground that the position of principal of the demonstration elementary schools required qualifications different from those for the regular principals' job, including among other things, experience with the race problems in relation to education and experience with community relations. The court explicitly made the distinction that it was the difference in the job that made the existing list inapplicable and that these additional requirements would have

to be tested for by "specific and objective criteria of experience in the area of community-education programs." (p. 468). The Court of Appeals said (p. 469): "This decision * * * is limited to a well-recognized power to create new positions for new needs and to fill them temporarily until lists based on examinations can be promulgated. The court will not permit such a procedure to be used as a device for evasion of the civil service requirements".

Thus the various civil service commissions of the State have power to define jobs and to state and test for the requirements for the jobs. But they cannot decide that what they wish to do is to give employment to particular persons or particular groups, and fit the requirements for the jobs to those groups. Here it is quite plain—it is indeed one of the express objectives of the program—that it is desired to give employment to residents of the Model Cities area and therefore the examinations are limited to such residents. This may be a very desirable thing to do. But I think it runs counter to the basic State constitutional requirements that "appointments and promotions in the civil service * * * shall be made according to merit and fitness."

6. Petitioners argue that the residence requirement involves reverse racial discrimination because the residents of the Model Cities area are largely Black or Spanish-speaking. The Court of Appeals in the *Council of Supervisory Assns.* case (*supra*) said: "The position could not lawfully be filled on the basis of race" (p. 467). "Race or religion cannot, as qualifying factors, constitutionally be considered but experience can be considered" (p. 468).

There are some statements by the Administrator of the Model Cities Policy Administration of the city which seem to lend some support to petitioners' contention, e.g., in a letter dated September 21, 1971, to the Assistant National Administrator, the City Administrator, Mr. Williams, states: "Rigid Civil Service requirements have been the major impediment to increasing the number of Blacks and Puerto Ricans in the Police and Fire Departments.

Thus, we believe our proposal is consistent with the intent of the Model Cities enabling legislation since it represents an important step in modifying those unfair requirements."

If the civil service requirements are unfair they should of course be corrected by appropriate changes in the examinations. But I do not think this justifies imposing residence requirements. Perhaps it is enough as to this aspect of the case to again quote the Court of Appeals in the *Council of Supervisory Assns.* case (p. 467): "The fact some proponents of experimental changes argued this would mean selection only from members of the ethnic groups themselves, as this record suggests, is not decisive. Nor is this viewpoint controlling on the board. This is not the basis on which the new position was described and promulgated in the official records of the board."

7. This is not the first time that an effort has been made by civil service commissions to limit appointment to residents of particular areas less than the political subdivision in which they are appointed, and to do so without statutory authority. Such efforts have uniformly been declared invalid on the ground that the only residence requirement that can be imposed without express statutory authority is a residence requirement not more restrictive than a recognized political subdivision of the State. So it was held in *People ex rel. Melledy* v. *Shea* (73 App. Div. 232, 235-236 [1st Dept., 1902]), where the court said: "It is not difficult to see that if the commission had power to subdivide a given locality into as many districts as it saw fit, and then by rules of its own adoption make an applicant ineligible to appointment to a position except in the district in which he resided at the time the application was made, how the object sought to be accomplished by the statute would be entirely defeated and the statute, in effect, repealed."

Indeed, where appointment is to a city-wide department, a requirement (without statutory authority) of residence within a particular borough for jobs within that borough is

invalid. (*People ex rel. Franklin* v. *Fetherston*, 168 App. Div. 416 [2d Dept., 1915].)

8. For the reasons stated, I think that in the circumstances of this case the requirement of residence is invalid.

Of course, even the constitutional requirement of merit and fitness (much less the statutory restriction on residence requirements) was not handed down on Mount Sinai. There is room for systems of values in which other considerations may even outweigh the constitutional requirement of appointments based on merit and fitness. (Indeed, the constitutional exception "as far as practicable" is to some extent a recognition of this fact; but "practicable" is not a synonym for "advisable".) Whether some other ends and values outweigh the requirement of merit and fitness or the statutory restriction on residence requirements is a question of policy to be determined by those to whom such decisions are confided—the people of the State, the Legislature, and perhaps the Congress—and the State Constitution and the applicable statutes are the definitive and binding expression of those policy determinations. The present statutes of this State I think forbid the residence requirement sought to be imposed.

Accordingly, the petition is granted to the extent of invalidating the examinations for Aide (Model Cities) and the requirement in connection therewith of residence in the Model Cities areas.

Decision and Order of Appellate Division

[37 A. D. 2d 803]

Order, Supreme Court, New York County, entered on September 29, 1971, modified on the law and the facts to the extent of vacating the stay of the examination contained in said order, and to the further extent of permitting the examination to go forward, but staying the promulgation of any resulting list or proposed acceptable answers, and

prohibiting any appointment based thereon until the determination of the motion in chief and subsequent appeal or appeals therefrom, if any, and otherwise affirmed, without costs and without disbursements. The foregoing determination is based upon the following reasons: It appears that by September 20, 1971 some 3,100 preapplication forms had already been received by the Civil Service Commission, the notice of the subject examination having issued on August 27, 1971, and it is anticipated that 3,100 applicants will appear for the examination at 9:30 A.M. tomorrow at the George Washington High School in Manhattan and the Thomas Jefferson High School in Brooklyn. The petitioners did not commence the instant proceeding until September 24, 1971, returning their order to show cause September 28, 1971. Since the examination per se does not displace nor limit the professional opportunities of any of the petitioners, and since the giving of the examination will not in any way affect the respective positions of the petitioners, the giving of the examination itself will not constitute a determination of status relative to those interested in taking the examination. Accordingly, we make no observation on the underlying merits of petitioners' petition until a full hearing has been held before Special Term presently scheduled for October 22, 1971, and the matter properly comes before us on an adequate record. Concur—McGivern, J. P., Kupferman, Murphy and McNally, JJ.; Nunez, J., dissents, in part, in the following memorandum: I concur except as to the continuance of the stay pending any appeal or appeals. It is unprecedented and clearly premature to grant a stay at this early date without any knowledge or consideration of the merits of the litigation. The court will be in a much better position to grant such a stay if warranted following the initial determination on the merits.